IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 13, 2003 Session

STATE OF TENNESSEE v. JASON D. PILLOW

Appeal from the Circuit Court for Maury County
No. 11850 Robert L. Jones, Judge

No. M2002-01864-CCA-R3-CD - Filed February 27, 2004

The defendant, Jason D. Pillow, was convicted of second degree murder, two counts of facilitation of attempted first degree murder, three counts of facilitation of attempted especially aggravated robbery, reckless endangerment, and facilitation of aggravated burglary. The trial court imposed a sentence of 25 years, which must be served at 100%, see Tenn. Code Ann. § 40-35-501(I)(1), (2)(B) (2003), for the second degree murder. Range I sentences of 12 years for each facilitation of attempted first degree murder, 6 years for each facilitation of attempted especially aggravated robbery, 2 years for reckless endangerment, and 4 years for facilitation of aggravated burglary were also imposed. The trial court ordered that the sentence for each facilitation of attempted first degree murder sentence be served consecutively to each other and to the second degree murder sentence. Further, the reckless endangerment sentence was ordered to be served consecutively to the sentences for second degree murder and facilitation of attempted first degree murder. The sentences for facilitation of attempted especially aggravated robbery are to be served concurrently to all the other sentences. Finally, the sentence for facilitation of aggravated burglary is to be served consecutively to the reckless endangerment sentence making the aggregate term 55 years. In this appeal, the defendant presents the following issues for review: (1) that the evidence was insufficient to support the convictions for facilitation of attempted first degree murder and facilitation of especially aggravated robbery; (2) that the trial court committed plain error by failing to instruct the jury on the lesser included offenses of facilitation of felony murder, aggravated assault, facilitation of aggravated assault, facilitation of attempted aggravated robbery, and attempted aggravated assault; (3) that the trial court committed plain error by failing to instruct the jury on the natural and probable consequences rule; (4) that the definitions of criminal responsibility and facilitation provided to the jury were inconsistent; (5) that the multiple convictions violate constitutional protections against double jeopardy; (6) that the trial court erred by refusing to suppress the defendant's pretrial statement; (7) that the closing argument by the state was improper; and (8) that the sentence is excessive. The judgments are affirmed.

Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which DAVID G. HAYES and JERRY L. SMITH, JJ., joined.

James Marshall (at trial) and Barton E. Kelley (on appeal), Columbia, Tennessee, for the appellant, Jason D. Pillow.

Paul G. Summers, Attorney General & Reporter; Kim R. Helper, Assistant Attorney General; Mike Bottoms, District Attorney General; and J. Daniel Runde, Robert C. Sanders, and Joseph L. Penrod, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

On February 22, 2000, three armed gunmen entered the apartment shared by Chastity and Brandi Buie and shot Randy Massey, Paul Readus, and David Houston. Houston was killed. At the time of the offenses, Chastity Buie and her son, Eric Taylor, shared the apartment with her sister, Brandi Buie, and Brandi Buie's children, Alexis and Deray. On the day of the offenses, Massey, along with Readus and Houston, had made arrangements to meet Chastity Buie at the apartment in order to take her to dinner for her birthday. Massey had also asked Chastity Buie to arrange for Houston to purchase an ounce of cocaine and she agreed to arrange the purchase through Pharez Price,[1] who had stayed at the apartment on the previous night. When Massey learned that the cocaine would cost $1500, however, he declined because of the expense. According to Chastity Buie, Price, who was still at the apartment, was angered by the response and threatened to "fix" them.

Massey, Readus, and Houston arrived at the apartment at approximately 4:30 p.m. and waited in the living room while Chastity Buie finished dressing. Price was watching television in one of the bedrooms. Ten-year-old Eric and six-year-old Alexis were in the kitchen and six-month-old Deray was asleep in a bedroom. After hearing a knock on the door, Brandi Buie went into the bathroom and while she was talking to her sister, heard gunshots. When Chastity Buie came out of the bathroom after the gunfire had stopped, she saw that Houston had been shot in the side. She then jumped from the balcony at the back of the apartment and ran to the front of the apartment to look for her son. Massey and Readus were lying on the sidewalk. Each had been shot. Later, she found Eric and Alexis in a neighbor's apartment. Chastity Buie never saw the intruders and was unable to identify the defendant as a participant in the crimes.

After Massey, Readus, and Houston arrived, Brandi Buie, Massey, and Houston drank cognac and smoked marijuana before traveling in Massey's car to pick up Eric and Alexis from daycare. When they returned, Chastity Buie was in the bathroom and Price was in a bedroom. Upon hearing a knock at the door, Brandy Buie looked through the peephole, saw only the top of a hat and mistakenly believed the visitor to be her sister's friend. After asking her sister to answer the door, Brandi Buie saw Massey open the door. When a man wearing a ski mask and carrying a long gun pushed his way into the apartment, Brandi Buie ran to the bathroom to warn her sister. She initially hid in a bedroom but after shots were fired, she ran into the other bedroom to get her baby, Deray. After taking the infant to her sister, she found that Houston, who had been shot in the side, was dying. Massey and Readus, both of whom had also been shot, asked her to call an ambulance. Price,

[1] See State v. Pharez Price, No. M2002-01717-CCA-R3-CD (Tenn. Crim. App., at Nashville, Apr. 11, 2003).

who was still inside the apartment, directed her to call the police. Explaining that he could not be there when the police arrived, Price jumped from the back balcony.

Eric Taylor, who was ten years old at the time of the offenses, testified at trial that Massey, Readus, and Houston were at the apartment just prior to the shooting. He recalled that shortly before the shooting, he overheard Price, who was in one of the bedrooms talking on the telephone, tell someone to "bring the guns." Later, Eric heard a knock at the door and saw three armed gunmen enter the apartment. He remembered that two of the men were carrying handguns and one was carrying a long gun. He also recalled that he heard gunfire just after Massey, Readus, and Houston began to struggle with the intruders. Eric then ran to a neighbor's apartment and asked them to telephone the police.

Paul Readus testified that when he arrived at the Buie apartment on the day of the offenses, Price said that he was sleepy and returned to a back bedroom. A few minutes later, Readus heard a knock and as Massey started to open the door, he saw three armed men pushed their way inside. Readus testified that the first individual to enter was carrying a handgun and was immediately grabbed by Houston. Readus stated that he struggled with a second gunman, who was carrying a "rifle-type" weapon and who shouted to his companions, "Kill that ni****." At that point, Readus was shot first in the knee and then in the abdomen. Readus testified that after he escaped outside, he was shot three more times, once in the finger, once in the forearm, and once in the back. He was airlifted to Vanderbilt Hospital where he was treated for eleven days. After leaving Vanderbilt, Readus spent eleven and one-half weeks at Bordeaux Hospital and more than ten weeks at Health South Hospital, where he had continued to receive treatment for his injuries until the trial date. Readus, who was paralyzed as a result of the injuries he received, could not identify the defendant as one of the intruders, explaining that the perpetrators wore masks during the attack.

Randy Massey testified that Houston initially wanted to purchase an ounce of cocaine but had cancelled the transaction because he believed the $1500 purchase price was too high. Massey recalled that when he answered a knock at the front door of the Buie apartment, two men, one carrying an assault rifle and another carrying a nine millimeter, pushed their way inside, demanding that the three victims "get down." Massey testified that he tried to escape to a back bedroom and when he was ordered by the intruders to stop, he grabbed Price, using him as a shield as he walked back through the hallway. Massey contended that when the intruders ordered him to release Price, he pushed Price toward the men and tried to escape through the front door. He recalled that one of the gunmen struck him in the head with a weapon three times before he reached the door. Massey was shot first in the buttock and then in the left leg. Later, Massey was airlifted to Vanderbilt Hospital, where he was treated for one week. As a result of the gunshot wounds, Massey has permanent nerve damage that will require hip replacement surgery.

Tennessee Bureau of Investigation Agent T.J. Jordan, who assisted in the investigation, learned from an interrogation of Price that Omar Jennings was one of the assailants. Later, Jennings identified Demarcus Gant and the defendant as the other participants in the offenses. In an interview which took place approximately five months after the crimes, the seventeen-year-old defendant

initially denied participation. After being informed of Jennings' statement, however, he admitted that he was present during the crimes. After a brief conversation with Officer Terry Perry, the defendant provided Agent Jordan with the following statement:

> Omar Jennings came to me as if a drug deal was going down. There was some boys from out-of-town that wanted some drugs. Omar was setting everything up with Pharez.
>
> When we went to the apartment, I was going to serve them. Sell them drugs. It was me, Demarcus Gant, and Omar Jennings. Omar was driving.
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> * * *
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> When we went to the apartment, we all had guns. I had a gun, because I was going to make a transaction. I did not know a robbery was going down. I did not have a mask on. I think Marcus may have had one on.
>
> We went up to the door and knocked. They opened the door. Omar and Marcus went in. They started fighting with the guys inside, and there were gunshots. I was the last inside the apartment. When I went in, I shot. I shot the guy who didn't make it outside. The guy that died. He was in the front room on the floor when I left.
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> After it went down, we ran back to the car and left. The gun I used was given to Omar. I don't know what he did with it. It was a chrome revolver. It had a short barrel. Since this happened, we haven't talked about it. When it happened, they was fighting. I didn't want to shoot nobody. It wasn't supposed to go down like that.

Later, Demarcus Gant provided Agent Jordan with a Ruger .357 revolver, claiming that the defendant had carried the weapon during the shootings.

Detective Roy Sellers of the Columbia Police Department, who was dispatched to the scene at 7:28 p.m. on the day of the offenses, found two of the victims lying on the sidewalk being attended by medical personnel. Upon entering the apartment, he found a large amount of blood with footprints and "skidmarks" in it, indicating that a struggle had taken place. A single .357 slug, fired from the weapon provided by Gant, was found in the body of the victim Houston.

Officer Terry Perry, Police Chaplain and Community Liaison for the Columbia Police Department, testified that a family resource counselor at Columbia Central High School informed him that the defendant wanted to talk to the police about the offenses and asked Perry to be present during the interview. During a brief recess in the interrogation, Officer Perry warned the defendant that "he was at a crossroads in his life and God knew what happened and he . . . just needed to tell the truth." At that point, the defendant admitted killing Houston, explaining that he knew he had done so "[b]ecause [Houston] didn't come out of the house."

Special Agent Jeff Crews of the TBI crime lab performed a toxicology screen on Houston. The tests revealed that Houston had a blood alcohol content of .04 percent but was negative for all other drugs.

Demarcus Gant, who had entered a plea of guilt to especially aggravated robbery for his role in the offenses, testified that Jennings, in the presence of the defendant, had asked him to help rob three men who were coming from out of town to buy drugs. Gant, a witness for the state, claimed that Jennings had learned from Price that the men would be carrying $4000 to $5000 cash. Gant, who acknowledged his willingness to participate in the robbery, recalled that Jennings was driving the defendant's car. Gant, who armed himself with an SKS assault rifle, explained that while Jennings had provided all of the information regarding the robbery, the defendant was present during the discussion. He recalled that Jennings telephoned Price from a convenience market before they drove to the Buie apartment. Initially, they drove past the Buie residence in order to determine whether their targets were still inside and then parked at the end of the street. Jennings knocked on the front door and entered first when the door was answered. Gant stated that when the defendant began to assist Jennings, who was struggling with one of the victims, another man grabbed Gant while a third individual grabbed his weapon. Gant stated that he struggled with the men and freed himself momentarily and that just as Houston grabbed him again, the defendant intervened, shooting Houston twice. Gant claimed that he did not fire his weapon because there were children present in the apartment. He contended that when he saw that Houston had been shot, he ran to the car, where Jennings and the defendant were waiting.

During cross-examination, Gant conceded that he and Jennings initially discussed going to the Buie residence to sell cocaine. Gant acknowledged writing a letter to the District Attorney General offering to provide information in other cases in exchange for full probation. Gant stated that his sentence for attempted especially aggravated robbery is to be suspended to probation after two years of incarceration.

Dr. Charles Harlan, who performed the autopsy on the victim Houston, testified that the cause of death was a "near gunshot wound" to the left chest. According to Dr. Harlan, the bullet entered the body just below the left nipple and traveled downward through the left lung, heart, and liver. Stippling around the wound indicated a firing distance of six to eight inches. It was Dr. Harlan's opinion that Houston could have lived for as long as twenty minutes after being shot.

The defendant, testifying on his own behalf, claimed that Jennings approached him at approximately 4:00 p.m. on the day of the offenses and inquired about purchasing 4.5 ounces of cocaine. When the defendant informed Jennings that he had only one ounce to sell, Jennings left and returned one-half hour later saying that he needed an ounce for an out-of-town buyer. He claimed that after Jennings told him that the buyer was willing to pay $1500, he agreed to let Jennings earn a $300 profit. According to the defendant, Jennings asked to borrow his car and he refused, instead offering to drive Jennings to the location of the sale. He testified that Gant joined them and Jennings asked to drive. The defendant claimed that when Gant armed himself with an SKS assault rifle, he asked why he had done so and Gant replied that the gun was to protect Jennings in the event of trouble. According to the defendant, Jennings stopped at a convenience market along the way to make a telephone call.

The defendant testified that when the three men arrived at the Buie residence, Jennings and Gant walked ahead of him. He claimed that by the time he reached the apartment door, Gant and Jennings were already involved in an altercation and two men were "wrestling Mr. Gant for his rifle." The defendant contended that when Houston grabbed at him, he pushed Houston away and shot him. The defendant stated that he continued to hear gunfire as he ran back to his car. The defendant explained that he did not initially give a statement to the police because he was scared. He expressed regret over Houston's death.

I. Sufficiency of the Evidence

The defendant contends that the evidence is insufficient to support his convictions for facilitation of attempted first degree murder and facilitation of especially aggravated robbery. On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956). Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

A. Facilitation of Attempted First Degree Murder

The defendant, who was originally charged with the attempted first degree murder of Massey and Readus, was convicted of two counts of facilitation of attempted first degree murder, a lesser included offense. Tennessee Code Annotated section 39-11-403 describes facilitation of a felony as follows:

> A person is criminally responsible for the facilitation of a felony if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony. Tenn. Code Ann. § 39-11-403(a). Attempt is defined as
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> (a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:

(1) Intentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;

(2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or

(3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

(b) Conduct does not constitute a substantial step under subdivision (a)(3) unless the person's entire course of action is corroborative of the intent to commit the offense.

Tenn. Code Ann. § 39-12-101(a), (b). First degree murder, in this instance, is defined as "[a] premeditated and intentional killing of another." Tenn. Code Ann. § 39-13-202(a)(1). Premeditation means that the defendant acted with a "previously formed design or intent to kill." State v. West, 844 S.W.2d 144, 147 (Tenn. 1992). Thus, the evidence, in the light most favorable to the state, must establish beyond a reasonable doubt that the defendant knew that Jennings intended to commit first degree premeditated murder of both Massey and Readus and that he furnished substantial assistance in the commission of those offenses.

Here, the evidence established that the defendant traveled to the Buie residence with Gant and Jennings to rob Massey, Readus, and Houston. All three carried weapons. The defendant was an active participant and was the first to fire his weapon during the confrontation, arguably escalating the gravity of the situation. Although robbery was the intended crime, the jury could have inferred that the intended crime became murder when Gant shouted, "[K]ill that ni****." Massey and Readus, neither of whom were armed, suffered terrible injury as a result of gunshot wounds received in the fray. In our view, the evidence is sufficient to support the convictions for facilitation of attempted first degree murder.

B. Facilitation of Attempted Especially Aggravated Robbery

Originally charged with especially aggravated robbery, the defendant was convicted of the lesser crime of facilitation of attempted especially aggravated robbery. "Especially Aggravated Robbery is robbery . . . (1) [a]ccomplished with a deadly weapon; and (2) [w]here the victim suffers serious bodily injury." Tenn. Code Ann. § 39-13-403(a). "Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401. To support a conviction for facilitation of attempted especially aggravated robbery, the evidence must demonstrate that the defendant knew that one of the co-defendants intended to rob Massey, Readus, and Houston by the use of a deadly weapon, that the victims suffered serious bodily injury, and that the defendant furnished substantial assistance in the commission of that crime.

Here, the evidence established that the defendant, Jennings, and Gant, each of whom was armed, planned to rob Massey, Readus, and Houston at the Buie residence. The three men used the defendant's car, entered the apartment armed with weapons, and when Houston struggled with Gant, the defendant fired the fatal shot. Massey and Readus suffered serious gunshot wounds during the commission of the offenses. In our view, the facts support convictions for facilitation of the attempted especially aggravated robberies of Massey, Readus, and Houston.

II. Jury Instructions

A. Lesser Included Offenses

The defendant asserts that the trial court erred by failing to instruct the jury on facilitation of felony murder as a lesser included offense of felony murder, aggravated assault and facilitation of aggravated assault as lesser included offenses of attempted first degree murder, and facilitation of attempted aggravated robbery as a lesser included offense of especially aggravated robbery. The defendant concedes that no objection was made to the instructions at trial and that the issue was not presented in the motion for new trial.[2] In this appeal, he argues that the failure to instruct on the lesser included offenses qualifies as plain error. See Tenn. R. Crim. P. 52(b) ("An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice.").

Generally, the failure to present an issue in a motion for new trial results in waiver. Rule 3(e) of the Tennessee Rules of Appellate Procedure provides that for appeals "in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, . . . or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived." Tenn. R. App. P. 3(e); see also State v. Martin, 940 S.W.2d 567, 569 (Tenn. 1997) (holding that a defendant relinquishes the right to argue on appeal any issues that should have been presented in a motion for new trial). Whether properly assigned or not, however, this court may consider plain error upon the record under Rule 52(b) of the Tennessee Rules of Criminal Procedure. State v. Ogle, 666 S.W.2d 58 (Tenn. 1984).

Before an error may be so recognized, it must be "plain" and must affect a "substantial right" of the accused. The word "plain" is synonymous with "clear" or equivalently "obvious." United States v. Olano, 507 U.S. 725, 732 (1993). Plain error is not merely error that is conspicuous, but

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[2]The defendant also mentions in passing the amendment to Tennessee Code Annotated section 40-18-110, which provides for waiver when a defendant fails to request instructions on the lesser included offenses in writing prior to trial. See Tenn. Code Ann. § 40-18-110 (2003). The state has not raised the statute as a ground for waiver of the defendant's claims. Moreover, the applicability of the statute in this case is not clear. While the Public Act creating the amendment states that it shall apply to all trials conducted after January 1, 2002, our supreme court has said, in State v. Moore, 77 S.W.3d 132 (Tenn. 2002), that the amendment applies only to trials for offenses committed after January 1, 2002. In any event, we need not determine in this case whether the statute applies because the trial court's failure to instruct on the complained of lesser included offenses qualifies as harmless beyond a reasonable doubt.

especially egregious error that strikes at the fairness, integrity, or public reputation of judicial proceedings. See State v. Wooden, 658 S.W.2d 553, 559 (Tenn. Crim. App. 1983). In State v. Adkisson, 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994), this court defined "substantial right" as a right of "fundamental proportions in the indictment process, a right to the proof of every element of the offense and . . . constitutional in nature." In that case, this court established five factors to be applied in determining whether an error is plain:

> (a) The record must clearly establish what occurred in the trial court;
> (b) a clear and unequivocal rule of law must have been breached;
> (c) a substantial right of the accused must have been adversely affected;
> (d) the accused [must not have waived] the issue for tactical reasons; and
> (e) consideration of the error must be "necessary to do substantial justice."

Id. at 641-42. Our supreme court characterized the Adkisson test as a "clear and meaningful standard" and emphasized that each of the five factors must be present before an error qualifies as plain error. State v. Smith, 24 S.W.3d 274, 282-83 (Tenn. 2000). In order to determine whether the trial court's failure to provide instructions to the jury on the complained of lesser included offenses qualifies as plain error, this court must first determine whether the failure to instruct was error at all.

The question of whether a given offense should be submitted to the jury as a lesser included offense is a mixed question of law and fact. State v. Rush, 50 S.W.3d 424, 427 (Tenn. 2001) (citing State v. Smiley, 38 S.W.3d 521 (Tenn. 2001)). The standard of review for mixed questions of law and fact is de novo with no presumption of correctness. Id.; see also State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). The trial court has a duty "to give a complete charge of the law applicable to the facts of a case." State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986); see also Tenn. R. Crim. P. 30.

In Burns, our supreme court adopted a modified version of the Model Penal Code in order to determine what constitutes a lesser included offense:

> An offense is a lesser included offense if:
> (a) all of its statutory elements are included within the statutory elements of the offense charged; or
> (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing
> (1) a different mental state indicating a lesser kind of culpability; and/or
> (2) a less serious harm or risk of harm to the same person, property or public interest, or
> (c) it consists of
> (1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser included offense in part (a) or (b); or
> (2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser included offense in part (a) or (b); or

(3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser included offense in part (a) or (b).

6 S.W.3d at 466-67.

While facilitation of felony murder is a lesser included offense of felony murder under part (c)(1) of the Burns test, see id., the trial court's failure to instruct on this offense can be classified as harmless beyond a reasonable doubt. See State v. Richmond, 90 S.W.3d 648, 662 (Tenn. 2002) (holding that "in deciding whether it was harmless beyond a reasonable doubt not to charge a lesser-included offense, the reviewing court must determine whether a reasonable jury would have convicted the defendant of the lesser-included offense instead of the charged offense"). In this case, there was uncontested proof that the defendant actually shot Houston. At trial, the defendant admitted that he shot and killed Houston. "[E]videntiary admissions by the defense that distinguish a lesser-included offense from the greater cannot be ignored and must be considered along with the uncontested evidence when conducting harmless error analysis." Id. Because the proof was overwhelming that the petitioner actually fired the fatal shot and was not merely a participant in the murder, it is our view that the trial court's failure to provide an instruction on facilitation of felony murder was harmless beyond a reasonable doubt. In consequence, the trial court's error could not qualify as plain.

With regard to the defendant's claim that the trial court erred by failing to instruct on facilitation of aggravated assault as a lesser included offense of attempted first degree murder, our courts have repeatedly held that aggravated assault is not a lesser included offense of attempted first degree murder. See State v. Trusty, 919 S.W.2d 305, 311-312 (Tenn. 1996), overruled on other grounds by State v. Dominy, 6 S.W.3d 472, 475 (Tenn. 1999); see also Randall Carver v. State, No. M2002-02891-CCA-R3-CO (Tenn. Crim. App., at Nashville, May 16, 2003); State v. Mario C. Estrada, No. M2002-00585-CCA-R3-CD (Tenn. Crim. App., at Nashville, Mar. 14, 2003), perm. app. granted, No. M2002-00585-SC-R11-CD (Tenn. June 30, 2003); State v. Renne Efren Arellano, No. M2002-00380-CCA-R3-CD (Tenn. Crim. App., at Nashville, Feb. 26, 2003), perm. app. granted, No. M2002-00380-SC-R11-CD (Tenn. June 30, 2003); State v. Randall White, No. M2000-01492-CCA-R3-CD (Tenn. Crim. App., at Nashville, Mar. 27, 2002); State v. Joshua Lee Williams, No. W2000-01435-CCA-R3-CD (Tenn. Crim. App., at Jackson, June 27, 2001); State v. Christopher Todd Brown, No. M1999-00691-CCA-R3-CD (Tenn. Crim. App., at Nashville, Mar. 9, 2000). Similarly, facilitation of aggravated assault would not be a lesser included offense of attempted first degree murder. In consequence, the trial court did not err by failing to instruct the jury as to those offenses.

Finally, it is our view that although the trial court should have provided an instruction on facilitation of attempted aggravated robbery, a lesser included offense of facilitation of especially aggravated robbery under the Burns test, the error was harmless beyond a reasonable doubt. The defendant, originally charged with one count of especially aggravated robbery and two counts of attempted especially aggravated robbery, was convicted of three counts of facilitation of attempted especially aggravated robbery. The evidence supporting the conviction for the greater offense in this

case was overwhelming. The defendant readily admitted the use of weapons during the offenses, see Tenn. Code Ann. § 39-13-403, and, as indicated, a reviewing court should not disregard admissions by the defendant. Further, the victims suffered serious bodily injury. See id. One victim died, another is paralyzed, and the third requires hip replacement surgery. Testimony from the occupants of the apartment corroborated Gant's testimony that robbery, rather than selling illegal drugs, was the intended crime. Under these circumstances, it is our view that the error in failing to instruct the jury on facilitation of attempted aggravated robbery was harmless beyond a reasonable doubt. See Richmond, 90 S.W.3d at 662. Thus, the trial court's failure to instruct on facilitation of attempted aggravated robbery cannot qualify as plain error.

B. Natural and Probable Consequences Instruction

The defendant contends that the trial court erred by failing to provide a jury instruction on the natural and probable consequences rule and that the error cannot be classified as harmless. The state submits that the defendant was not entitled to the instruction with regard to the felony murder charge because he was charged as the principal in that offense and not under a theory of criminal responsibility. The state further submits that the instruction was not warranted with regard to the attempted especially aggravated robbery charge because robbery was the target crime. As to the attempted first degree murder charges, the state argues that the failure to provide the natural and probable consequences instruction was harmless beyond a reasonable doubt because the defendant was convicted of facilitation of those crimes.

Initially, we note that the defendant failed to object to the jury charge at trial and did not raise this issue in his motion for new trial. As indicated, the failure to present an issue in a motion for new trial may result in waiver. See Tenn. R. App. P. 3(e); Martin, 940 S.W.2d at 569. Furthermore, it is our view that the defendant is not entitled to relief on the merits.

"The natural and probable consequences rule arose as a common law component of criminal responsibility and extends criminal liability to the crime intended by a defendant, and collateral crimes committed by a co-defendant, that were the natural and probable consequences of the target crime." Richmond, 90 S.W.2d at 654 (citing State v. Carson, 950 S.W.2d 951 (Tenn. 1997)). The applicable definition of criminal responsibility provides that "[a] person is criminally responsible for an offense committed by the conduct of another if . . . [a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense." Tenn. Code Ann. § 39-11-402(2) (1997). In interpreting this statute, our supreme court made the following observations:

> [T]he statute makes a defendant criminally liable for the acts of confederates that are the natural and probable consequence of the crime in which the defendant participated. Extending criminal liability to secondary actors is reasonable as long as the crimes committed by others were the foreseeable result of the consummation of the intended crime. Thus, the statute may apply despite the fact that the criminal conduct of others differs from or exceeds the scope of the target crime.

Richmond, 90 S.W.3d at 655. In State v. Howard, 30 S.W.3d 271 (Tenn. 2000), the high court developed a test to be applied when criminal liability is based upon the natural and probable consequences rule. Our supreme court held that the state was required to prove beyond a reasonable doubt "(1) the elements of the crime or crimes that accompanied the target crime; (2) the defendant was criminally responsible pursuant to Tennessee Code Annotated section 39-11-402; and (3) that the other crimes that were committed were the natural and probable consequences of the target crime." Howard, 30 S.W.3d at 276. Where the state seeks to prove that the crime charged is the natural and probable consequence of the target crime, proper jury instructions will include a reference to the natural and probable consequences rule. Richmond, 90 S.W.3d at 657.

In this case, the state did not pursue a theory at trial that the defendant was criminally responsible for the conduct of another in regard to the shooting of Houston. Rather, he was charged as a principal with felony murder for the death of Houston. Because the defendant was not charged with or held liable for Houston's death under a theory of criminal responsibility, an instruction on the natural and probable consequences rule was not required as to that offense. See id. at 654 (instruction on the natural and probable consequences rule is only necessary when a defendant is charged under a theory of criminal responsibility).

The state did, however, pursue a theory that he was criminally responsible for the conduct of Jennings and Gant with regard to the remaining crimes. As to the defendant's charges for the attempted especially aggravated robberies of Massey, Readus, and Houston, our supreme court has held that the natural and probable consequences instruction is required only when the defendant is held liable for collateral crimes and not when the defendant is held criminally responsible for the completion of the target crime. See Howard, 30 S.W.3d at 276. In this case, the proof at trial established that robbery was the target crime. In consequence, the trial court was not required to provide an instruction on the natural and probable consequences rule with regard to the charges resulting from the attempted especially aggravated robberies of Massey, Readus, and Houston.

As to the charges for the attempted first degree murder of Massey and Readus, the proof established at trial that these crimes were collateral to the target crime of robbery. Further, the state pursued a theory at trial that the defendant was criminally responsible for Jennings' conduct in shooting Massey and Readus. In consequence, the trial court erred by failing to provide an instruction on the natural and probable consequences rule as to these charges. Because the failure to provide a natural and probable consequences instruction when warranted by the evidence is an error of constitutional magnitude, see Richmond, 90 S.W.3d at 658; Howard, 30 S.W.3d at 277 n.6, the state must show that the error was harmless beyond a reasonable doubt.

While originally charged with criminal responsibility for attempted first degree murder, the defendant here was convicted of the lesser included offense of facilitation of attempted first degree murder and acquitted of the higher offense. At trial, the defendant admitted arming himself and traveling with Jennings and Gant, who were also armed, to the Buie residence. He assisted Gant as he struggled with two of the victims and he eventually shot Houston. The essential evidence was relatively undisputed. Under these circumstances, it is our view that any error in the failure to

provide an instruction on the natural and probable consequences rule would be harmless beyond a reasonable doubt. Because the trial court's failure to provide an instruction on the natural and probable consequences rule was harmless beyond a reasonable doubt, the error cannot be classified as "plain."

C. Facilitation of Attempted First Degree Murder and Facilitation of Attempted Especially Aggravated Robbery

The defendant asserts that he should not have been convicted of facilitation of attempted first degree murder and facilitation of attempted especially aggravated robbery because the definitions for those offenses are in direct conflict. He contends that while one must act with the intent required for the offense to be convicted of criminal attempt, facilitation necessarily requires that one act with a lesser intent. The state submits that the definition of facilitation is not inconsistent with that of criminal responsibility but that it is a lesser degree of criminal responsibility. Further, the state argues that the defendant can be convicted of facilitating the substantive crime of attempt.

As indicated, the defendant failed to object to the jury instructions at trial. In consequence, he has waived our consideration of this issue. See Tenn. R. App. P. 3(e); Martin, 940 S.W.2d at 569. Moreover, a review of this issue under a plain error analysis may not be appropriate because it is not clear from the record that a clear and unequivocal rule of law was breached. See Adkisson, 899 S.W.2d at 641-42. Indeed, this court has repeatedly affirmed convictions for the facilitation of criminal attempt, see, e.g., State v. Pharez Price, No. W2002-01376-CCA-R3-CD (Tenn. Crim. App., at Jackson, Sept. 25, 2003), indicating that, contrary to the defendant's assertions, such a crime exists under Tennessee law. It is our view that a clear and unequivocal rule of law was not breached and review of the issue is not necessary to do substantial justice. See Adkisson, 899 S.W.2d at 641-42.

III. Double Jeopardy

The defendant next asserts that his multiple convictions violate principles of double jeopardy because all of the offenses arose from a single course of conduct and occurred at exactly the same time and place. Citing State v. Anthony, 817 S.W.2d 299 (Tenn. 1991), he further asserts that the elements of each of the crimes were incidental to and necessarily included in the others. The state submits that the defendant has waived this issue by failing to raise it in a motion for new trial. In the alternative, the state contends that the multiple convictions do not violate the principles of double jeopardy. The defendant asks this court to review the issue under the plain error doctrine.

The double jeopardy clause of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Similarly, Article 1, section 10 of the Tennessee Constitution provides that "no person shall, for the same offense, be twice put in jeopardy of life or limb." Tenn. Const. art. 1, § 10. Our supreme court has noted that "three fundamental principles underlie double jeopardy: (1) protection against a second prosecution after an acquittal; (2) protection against a second prosecution after conviction;

and (3) protection against multiple punishments for the same offense." State v. Denton, 938 S.W.2d 373, 378 (Tenn. 1996) (citations omitted). Proof that the offenses have the exact same statutory elements is not required to establish that offenses are the "same" for double jeopardy purposes. Id. at 379 (citing Jeffers v. United States, 432 U.S. 137 (1977)). Our high court observed that "whether two offenses are the 'same' for double jeopardy purposes depends upon a 'close and careful analysis of the offenses involved, the statutory definitions of the crimes, the legislative intent and the particular facts and circumstances.'" Id. (quoting State v. Black, 524 S.W.2d 913, 919 (Tenn. 1975)). Finally, our supreme court noted that while appellate review must be guided by the test announced in Blockburger v. United States, 284 U.S. 299, 304 (1932), that test is not conclusive of legislative intent and the reviewing court must also examine (1) whether there were multiple victims involved; (2) whether several discrete acts were involved; and (3) whether the evil at which each offense is directed is the same or different. Denton, 938 S.W.2d at 378-79. The Blockburger test provides that "[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Blockburger, 284 U.S. at 304.

Here, the defendant was convicted of second degree murder for the killing of Houston, facilitation of attempted first degree murder of Massey, facilitation of attempted first degree murder of Readus, facilitation of attempted especially aggravated robbery of Houston, facilitation of attempted especially aggravated robbery of Massey, facilitation of attempted especially aggravated robbery of Readus, reckless endangerment, and facilitation of aggravated burglary of the Buie residence. In our view, offenses with different named victims would not be the same for double jeopardy purposes. Further, each of the offenses requires proof of an element that the other does not. As indicated, facilitation of attempted especially aggravated robbery requires proof that the defendant knew about and furnished substantial assistance in the commission of an attempt to commit especially aggravated robbery, which requires a showing that the victim suffered serious bodily injury during a robbery that was accomplished by the use of a deadly weapon. See Tenn. Code Ann. §§ 39-11-403, 39-12-101, 39-13-403. Facilitation of attempted first degree murder only requires proof that the defendant knew about and provided substantial assistance in the commission of an attempted premeditated murder. See Tenn. Code Ann. §§ 39-11-403, 39-12-101, 39-13-202. Proof that the victim suffered serious bodily injury or that the defendant used a deadly weapon is not required. Similarly, convictions for reckless endangerment and facilitation of aggravated burglary do not require proof that the defendant used a deadly weapon or that the victim suffered serious bodily injury. See Tenn. Code Ann. § 39-13-103 ("A person commits an offense who recklessly engages in conduct which places or may place another person in imminent danger of death or serious bodily injury."); Tenn. Code Ann. § 39-14-403 ("Aggravated burglary is burglary of a habitation as defined in § 39-14-401 and 39-14-402."). Accordingly, the offenses would not be the "same" for double jeopardy purposes. The defendant is not entitled to relief on this issue.

IV. Motion to Suppress

The defendant contends that the trial court should have granted the motion to suppress his statement to Agent Jordan because he claims that his request to remain silent was not scrupulously

honored. In addition, he claims that the statement is constitutionally infirm because, as a minor, he was questioned outside the presence of his parents. The state submits that the defendant did not make a request to remain silent and that his actions during the interrogation cannot be treated as an unequivocal request to remain silent.[3]

The standard of review applicable to suppression issues is well established. When the trial court makes a finding of facts at the conclusion of a suppression hearing, the facts are accorded the weight of a jury verdict. State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994). The trial court's findings are binding upon this court unless the evidence in the record preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996); see also Stephenson, 878 S.W.2d at 544; State v. Goforth, 678 S.W.2d 477, 479 (Tenn. Crim. App. 1984). Questions of credibility of witnesses, the weight and value of the evidence and resolution of conflicts in evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from the evidence. Odom, 928 S.W.2d at 23. This court's review of a trial court's application of law to the facts, however, is conducted under a de novo standard of review. See State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001); State v. Crutcher, 989 S.W.2d 295, 299 (Tenn. 1999).

A. Right to Remain Silent

The Fifth Amendment to the United States Constitution provides that "no person . . . shall be compelled in any criminal case to be a witness against himself ." U.S. Const. amend. V; see also Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding that the Fifth Amendment's protection against compulsory self-incrimination is applicable to the states through the Fourteenth Amendment). Article I, section 9 of the Tennessee Constitution provides that "in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. "The significant difference between these two provisions is that the test of voluntariness for confessions under Article I, § 9 is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment." State v. Crump, 834 S.W.2d 265, 268 (Tenn. 1992).

Generally, one must affirmatively invoke these constitutional protections. An exception arises, however, when a government agent makes a custodial interrogation. Statements made during the course of a custodial police interrogation are inadmissible at trial unless the state establishes that the defendant was advised of his right to remain silent and his right to counsel and that the defendant then waived those rights. Miranda v. Arizona, 384 U.S. 436, 471-75 (1966); see also Dickerson v. United States, 530 U.S. 428, 444 (2000); Stansbury v. California, 511 U.S. 318, 322 (1994). A defendant's rights to counsel and against self-incrimination may be waived as long as the waiver is made voluntarily, knowingly, and intelligently. Miranda, 384 U.S. at 478; State v. Middlebrooks,

[3]The state questions the timeliness of the motion for new trial. We note that the trial court's order regarding the timing of the filing of the motion for new trial notes that the state agreed that the motion would be treated as timely filed. In consequence, the state may not now complain that the motion was not timely.

840 S.W.2d 317, 326 (Tenn. 1992). In order to effect a waiver, the accused must be adequately apprised of his right to remain silent and the consequence of deciding to abandon the right. Stephenson, 878 S.W.2d at 544-45. In determining whether a confession was voluntary and knowing, the totality of the circumstances must be examined. State v. Bush, 942 S.W.2d 489, 500 (Tenn. 1997). If the "greater weight" of the evidence supports the court's ruling, it will be upheld. Id. This court must conduct a de novo review of the trial court's application of law to fact. State v. Bridges, 963 S.W.2d 487 (Tenn. 1997); State v. Yeargan, 958 S.W.2d 626 (Tenn. 1997).

In Miranda, the United States Supreme Court limited its holding to a "custodial interrogation." Miranda, 384 U.S. at 478-79. The Court defined the phrase "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 444. A person is "in custody" within the meaning of Miranda if there has been "a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983) (citation omitted). The Court has refused to extend the holding in Miranda to non-custodial interrogations. See Oregon v. Mathiason, 429 U.S. 492 (1977) (holding that an accused's confession was admissible because there was no indication that the questioning took place in a context where his freedom to depart was restricted in any way); see also Beheler, 463 U.S. at 1124-25 (noting that the ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest). In determining whether a reasonable person would consider himself or herself in custody, our supreme court considers a variety of factors, including the following:

> [T]he time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will.

State v. Walton, 41 S.W.3d at 82-83 (quoting State v. Anderson, 937 S.W.2d 851, 855 (Tenn. 1996)).

Here, the defendant concedes that he was informed of his Miranda rights but argues that the interrogation should have ended when he affirmatively asserted his right to remain silent. He claims that when he stood up, extended his arms to be handcuffed, and asked Agent Jordan to make the arrest, his actions were tantamount to an unequivocal exercise of his right to remain silent. The trial court determined that the defendant's actions, while unusual, did not constitute "a statement by [the

defendant] that he did not want to continue with this interrogation . . . [or] that he did not want to give a statement."

In our view, the ruling in State v. Crump provides substantial guidance. Crump, who was arrested after escaping from a Department of Correction work detail, was a suspect in a homicide committed on the day of his escape. Upon being arrested, he was handcuffed and placed in the front seat of a squad car. A detective provided Miranda warnings and then inquired whether Crump wanted to make a statement. When Crump replied, "I don't have anything to say, "the detective ended the interrogation. Later, another officer, hoping to gain information related to the homicide, invited Crump to join him in a trip to the scene of his escape. Crump accepted the offer and two officers took him on a 30- to 45-minute drive, retracing the escape route. Eventually, the officers stopped the car and asked Crump whether he had stolen anything from a car in the parking lot. When Crump admitted that he had, one of the officers informed him that the stolen items had been found at the homicide scene. The two officers observed an emotional change in Crump and upon returning to the station, Crump was again provided Miranda warnings and, after signing a written waiver of his rights, confessed to the homicide. The trial court found that the right to remain silent had not been "scrupulously honored" and suppressed the recorded confession and the statements made by Crump while riding in the police car. On appeal, our supreme court ultimately held that the trial court had correctly excluded the statements and confession:

> To fully honor an accused's self-incrimination rights, . . . "once warnings have been given, . . . if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At that point, he has shown that he intends to exercise his Fifth Amendment privilege."
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> * * *
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> The facts presented in this appeal clearly demonstrate that [the defendant's] right to cut off questioning by invocation of his right to remain silent was not "scrupulously honored." Thirty minutes after responding to Miranda warnings with "I don't have anything to say," he was taken on a 30 to 45-minute drive and questioned while retracing the route of his escape. This clearly constituted an impermissible resumption of in-custodial interrogation, which caused the admissions made by Crump during the drive to be inadmissible.
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> * * *
>
> After reviewing the record, we conclude that the police failure to scrupulously honor [the defendant's] invocation of his right to remain silent amounted to a violation of the defendant's state and federal constitutional rights. . . . Once an individual invokes his right to remain silent and the police fail to honor that invocation by continuing to interrogate him, that violation, by definition, is of constitutional magnitude.
>
> * * *
>
> Although the officers did administer Miranda warnings before obtaining the taped confession, there were no intervening circumstances. In addition, the temporal proximity of the police misconduct to the confession was too short to purge the

> confession of the taint of the prior constitutional violation. Therefore, we find that the taped confession is inadmissible "fruit of the poisonous tree."

834 S.W.2d at 269-70, 272 (citations omitted). After concluding that the defendant's confession was involuntary, our supreme court reversed the conviction and granted a new trial.

Although the principles of Crump would apply, the facts are distinguishable. Here, the defendant made no verbal assertion of his right to remain silent. Standing and demanding arrest cannot be interpreted as an affirmative assertion of Fifth Amendment protection. In our view, these actions, in the context presented here, qualify as neither an equivocal or an unequivocal exercise of the right against self-incrimination. Accordingly, the evidence does not preponderate against the findings of the trial court and the defendant is not entitled to relief on this ground.

B. Voluntariness

The defendant also asserts that the trial court should have granted his motion to suppress his statement to Agent Jordan because he was questioned outside the presence of his mother.[4] In response, the state insists that the statement was entirely voluntary.

In State v. Gordon, 642 S.W.2d 742, 745 (Tenn. Crim. App. 1982), this court ruled that when full Miranda warnings have been provided and understood, the voluntariness and admissibility of a juvenile's confession is not dependent upon the presence of his parents at the interrogation. See also State v. Turnmire, 762 S.W.2d 893 (Tenn. Crim. App. 1988). The appropriate standard for determining admissibility is "whether, under the totality of the circumstances, the . . . confession was the result of a knowing and intelligent waiver of . . . constitutional rights." State v. Lundy, 808 S.W.2d 444, 446 (Tenn. 1991). Our supreme court has held that the court must consider the following factors:

> (1) consideration of all circumstances surrounding the interrogation including the juvenile's age, experience, education, and intelligence;
> (2) the juvenile's capacity to understand the Miranda warnings and the consequences of the waiver;
> (3) the juvenile's familiarity with Miranda warnings or the ability to read and write in the language used to give the warnings;
> (4) any intoxication;

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[4] Tennessee Code Annotated section 37-1-127, which provides that statements obtained from a juvenile defendant in violation of the rule requiring that juveniles taken into police custody be released either to the court or a parent within a reasonable time may not be used against the juvenile, see Tenn. Code Ann. § 37-1-115, does not apply here. First, Tennessee Code Annotated section 37-1-115 does not mandate the presence of a parent during the questioning of a juvenile but instead requires the prompt release of a juvenile taken into police custody. See Lundy, 808 S.W.2d at 447. Second, the defendant was not taken into police custody before his interrogation but instead traveled voluntarily to the station to make a statement. Third, our supreme court has held that the protections of Tennessee Code Annotated section 37-1-127 apply only to proceedings in juvenile court. See id.

(5) any mental disease, disorder, or retardation; and
(6) the presence of a parent, guardian, or interested adult.

State v. Callahan, 979 S.W.2d 577, 583 (Tenn. 1997). Our high court also determined that "[w]hile courts shall exercise special care in scrutinizing purported waivers by juvenile suspects, no single factor such as mental condition or education should by itself render a confession unconstitutional absent coercive police activity." Id. (citing Colorado v. Connelly, 479 U.S. 157 (1986))

In this instance, the seventeen-year-old defendant, who was a student at Columbia Central High School, drove to the police station after having been informed that the police sought him for questioning. Because of his prior juvenile record, he had some familiarity with the criminal justice system. The defendant could read and write and, by all appearances, fully understood the Miranda warnings. There was no indication that he was either intoxicated or affected by a diminished mental capacity. Although the defendant's mother was not present during the interrogation, the trial court accredited testimony that the defendant was unable to locate his mother. The record demonstrates that the defendant provided written consent to be questioned outside the presence of a parent. Even though the defendant did not have the benefit of his mother's presence during the interrogation, the evidence does not preponderate against the trial court's finding that the waiver of his right to counsel and his privilege against self-incrimination was knowingly, voluntarily, and intelligently made.

V. Closing Argument

The defendant claims that the prosecutor engaged in prosecutorial misconduct during the closing argument by encouraging the jury to convict based upon passion and caprice rather than logic and reason. The state contends that the defendant has waived this issue by failing to lodge a contemporaneous objection. Alternatively, the state asserts that even if the comments were improper, they had no effect on the verdict.

Trial courts have substantial discretionary authority in determining the propriety of final argument. Although counsel is generally given wide latitude, courts must restrict any improper argument. Sparks v. State, 563 S.W.2d 564 (Tenn. Crim. App. 1978). Generally speaking, closing argument "must be temperate, must be predicated on evidence introduced during the trial of the case, and must be pertinent to the issues being tried." State v. Sutton, 562 S.W.2d 820, 823 (Tenn. 1978). For example, our supreme court has ruled that argument that "that defense counsel was 'trying to throw sand in the eyes of the jury' and 'blowing smoke in the face of the jury'" was improper argument. State v. West, 767 S.W.2d 387, 395 (Tenn. 1989). To merit a new trial, however, the argument must be so inflammatory or improper as to affect the verdict. Harrington v. State, 215 Tenn. 338, 385 S.W.2d 758 (1965). In Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976), this court articulated the factors to be considered in making that determination:

(1) the conduct complained of viewed in the context and the light of the facts and circumstances of the case;
(2) the curative measures undertaken by the court and the prosecution;

(3) the intent of the prosecutor in making the improper statements;
(4) the cumulative effect of the improper conduct and any other errors in the record; and
(5) the relative strength or weakness of the case.

Most restrictions during final argument are placed upon the state. That is based in great measure upon the role of the prosecutor in the criminal justice system:

> [The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor, indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger v. United States, 295 U.S. 78, 88 (1935); see also Judge, 539 S.W.2d at 344-45. Thus, the state must refrain from argument designed to inflame the jury and should restrict its commentary to matters in evidence or issues at trial. The prosecutor must not express a personal belief or opinion, but whether that qualifies as misconduct often depends upon the specific terminology used. For example, argument predicated by the words "I think" or "I submit" does not necessarily indicate an expression of personal opinion. United States v. Stulga, 584 F.2d 142 (6th Cir. 1978). The prosecution is not permitted to reflect unfavorably upon defense counsel or the trial tactics employed during the course of the trial. See Dupree v. State, 219 Tenn. 492, 410 S.W.2d 890 (1967); Moore v. State, 159 Tenn. 112, 17 S.W. 30 (1929); Watkins v. State, 140 Tenn. 1, 203 S.W. 344 (1918); McCracken v. State, 489 S.W.2d 48 (Tenn. Crim. App. 1972). Although there may be no commentary on the consequences of an acquittal, the prosecution may point out the gravity of a particular crime and emphasize the importance of law enforcement. See State v. Dakin, 614 S.W.2d 812 (Tenn. Crim. App. 1980); Bowling v. State, 3 Tenn. Crim. App. 176, 458 S.W.2d 639 (1970).

This court has observed that there are five generally recognized areas of prosecutorial misconduct related to closing argument:

> 1. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

2. It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
3. The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
4. The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.
5. It is unprofessional conduct for a prosecutor to intentionally refer to or argue facts outside the record unless the facts are matters of common public knowledge.

State v. Goltz, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003).

The defendant complains about the following portion of the state's final argument:

> Ladies and gentlemen of the jury, with all due respect to you, and for asking for a modicum of justice for Mrs. Houston, who has had to bury her son during the prime of his life, the State requests that you bury Mr. Pillow. Find him guilty of these offenses, and put him down in the penitentiary, to where he will not be able to see and breath the free air of day, just as the son of Mrs. Houston has been laid low in the cold soil and he cannot breath the free, fresh, clear air of day, or feel the warmth of the sun on his face
>
> The State would ask you, based upon reasonable verdicts in this case, to cripple Mr. Pillow. Cripple him from his admitted future drug dealings in this community; his future carrying around of .357 Magnums; his future activities by crippling him with guilty verdicts, so that he'll be in the penitentiary and will not be set f[r]ee to ever cripple a man, again, like you saw Mr. Readus crippled in this courtroom.
>
> And the State asks you for reasonable verdicts of guilty to hobble Mr. Pillow for his crimes, by finding him guilty of these various offenses, so that he will be hobbled and his gait will be bent, and he not be able to use his legs in the way that he has hobbled and changed the gait of Mr. Massey, so that he will be deterred, and others.

Immediately following these comments, the trial court sua sponte entered a curative instruction:

> Ladies and gentlemen, to avoid any error in this record - - and I'm sure Mr. Runde is concerned about that as much as this Court is - - please understand that Mr. Runde is not asking you to sentence or to find anyone guilty of a crime in this case so that they will not in the future sell drugs. That's not a proper consideration for the jury in this case.

The prosecutor should not have encouraged the jury to convict the defendant based upon his role as a drug dealer. He was not charged with the possession or sale of illegal drugs. This court must presume, however, that the jury followed the trial court's curative instruction. See State v. Smith, 893 S.W.2d 908, 914 (Tenn. 1994); State v. Woods, 806 S.W.2d 205, 211 (Tenn. Crim. App. 1990). Further, the prosecutor should not have asked the jury to "bury," "cripple," or "hobble" the defendant. While he was speaking figuratively, his argument appears to have been designed to arouse the passions of the jury, which is generally prohibited. See Goltz, 111 S.W.3d at 6; Coker v. State 911 S.W.2d 357, 368 (Tenn. Crim. App. 1995). When viewed in the context of the entire final argument, which was generally temperate and appropriate, however, it does not appear that the comments, which were isolated, had an effect on the jury's verdict. Thus, any error would qualify as harmless. See Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

VI. Sentencing

Finally, the defendant complains that his sentence is excessive. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

A. Application of Enhancement and Mitigating Factors

In calculating the sentence for a Class A felony conviction, the presumptive sentence is the midpoint within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancement factors but no mitigating factors, the trial court shall set the sentence at or above the midpoint. Tenn. Code Ann. § 40-35-210(d). If there are mitigating factors but no enhancement factors, the trial court shall set the sentence at or below the midpoint. Id. A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. §

40-35-210(e). The sentence should then be reduced within the range by any weight assigned to the mitigating factors present. Id.

When determining the sentence for a Class B, C, D, or E felony conviction, the presumptive sentence is the minimum in the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancement but no mitigating factors, the trial court may set the sentence above the minimum, but still within the range. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence should then be reduced within the range by any weight assigned to the mitigating factors present. Id.

In arriving at a sentence of twenty-five years, the maximum within the range, for the second degree murder conviction, the trial court applied the following enhancement factors:

> (4) The offense involved more than one victim;
> (10) the defendant possessed or employed a firearm during the commission of the offense; and
> (11) the defendant had no hesitation about committing a crime when the risk to human life was high.

See Tenn. Code Ann. § 40-35-114 (4), (10), (11) (2003). The trial court found two mitigating factors applicable: (1) the defendant, because of youth or old age, lacked substantial judgment in committing the offenses and (2) the defendant's lack of an adult criminal record. See Tenn. Code Ann. § 40-35-113 (6), (13).

With regard to the convictions for facilitation of attempted first degree murder, facilitation of attempted especially aggravated robbery, reckless endangerment and facilitation of aggravated burglary, for which the maximum sentences were imposed, the trial court applied the following enhancement factors:

> (4) The offense involved more than one victim;
> (7) the personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great;
> (10) the defendant possessed or employed a firearm during the commission of the offense; and
> (11) the defendant had no hesitation about committing a crime when the risk to human life was high.

See Tenn. Code Ann. § 40-35-114(4), (7), (10), and (11) (2003). The trial court also found enhancement factor (13), that the defendant "willfully inflicted serious bodily injury upon another person, or the actions of the defendant resulted in the death of or serious bodily injury to a victim or a person other than the intended victim," was applicable to the conviction for facilitation of

attempted aggravated burglary. In mitigation, the trial court cited the defendant's youth and his lack of a criminal record as an adult. See Tenn. Code Ann. § 40-35-113(6), (13).

The defendant asserts, and the state concedes, that the trial court erred by applying enhancement factor (4), that the offense involved more than one victim, because there were separate convictions relating to each victim. In State v. McKnight, 900 S.W.2d 36 (Tenn. Crim. App. 1994), this court ruled that the multiple victim factor is not applicable when convictions are entered for each victim, as in this case. See also State v. Williamson, 919 S.W.2d 69, 82 (Tenn. Crim. App. 1995) (holding that the multiple victim enhancement factor cannot be applied when the defendant is convicted of separate offenses against each victim). Moreover, although the Buie sisters and their children were present, they cannot be classified as "victims" for purposes of the application of this enhancement factor because they were not "injured, killed, [did not have] property stolen, [and did not have] property destroyed by the perpetrator of the crime." State v. Raines, 882 S.W.2d 376, 384 (Tenn. Crim. App. 1994); see also State v. Cowan, 46 S.W.3d 227, 235-36 (Tenn. Crim. App. 2000) (holding that others present when the defendant attacked the victim were not "victims" as contemplated by Tennessee Code Annotated section 40-35-114(4) because they "had no physical contact with the defendant during the commission of the crime, nor was any property taken from them"). Because the defendant received separate convictions for each victim and because neither the Buie sisters nor their children qualify as "victims," the trial court's application of this factor was erroneous.

The defendant next contends, and the state agrees, that the trial court should not have applied enhancement factor (11), that the defendant had no hesitation about committing a crime when the risk to human life was high, to the defendant's convictions for facilitation of attempted first degree murder because "the risk to human life and the great potential for bodily injury always exist with an attempted first degree murder." State v. Nix, 922 S.W.2d 894, 903 (Tenn. Crim. App. 1995). This court has held, however, that this factor may be applied to a conviction for attempted first degree murder where persons other than the intended victim were present and could have been injured as a result of the defendant's actions. See State v. Makoka, 885 S.W.2d 366, 373 (Tenn. Crim. App. 1994). This factor should not, however, have been used to enhance the convictions for facilitation of especially aggravated robbery because "there is necessarily a high risk to human life and the great potential for bodily injury whenever a deadly weapon is used." Id. (citing State v. Hill, 885 S.W.2d 357, 363 (Tenn. Crim. App. 1994); State v. Hicks, 868 S.W.2d 729, 732 (Tenn. Crim. App. 1993)). This factor was appropriately applied to the conviction for second degree murder because the evidence established that the defendant created a high risk to the lives of persons other than Houston. See State v. Bingham, 910 S.W.2d 448 (Tenn. Crim. App. 1995).

Next, the state concedes, and we agree, that enhancement factors (7), that the defendant willfully inflicted serious bodily injury during the commission of the offense, and (10), that the defendant employed a firearm during the offense, should not have been applied to the convictions for facilitation of attempted especially aggravated robbery. Those factors are essential elements of the offense. See Tenn. Code Ann. § 39-13-403(a); Jones, 883 S.W.2d at 602; Nix, 922 S.W.2d at

903; see also State v. Jerry B. Crow, No. 01C01-9310-CR-00348 (Tenn. Crim. App., at Nashville, Nov. 6, 1995). Factor (10), however, was appropriately applied to the remaining convictions.

The state asserts that the trial court should have applied enhancement factor (21), that the defendant committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult, to each of the defendant's convictions. The presentence report establishes that the defendant was adjudicated to have committed a number of offenses as a juvenile, including two counts of burglary. Burglary is a felony offense, regardless of the degree. See Tenn. Code Ann. §§ 39-14-402 - 39-14-404. Enhancement factor (21) is, therefore, applicable and may be considered as to each offense.

In summary, the trial court should not have applied enhancement factor (4), that the offense involved more than one victim, to any of the defendant's convictions. Additionally, factors (7), that the defendant willfully inflicted serious bodily injury during the commission of the offense; (10), that the defendant employed a firearm during the offense; and (11), that the defendant had no hesitation about committing a crime when the risk to human life was high, should not have been applied to the convictions for facilitation of especially aggravated robbery. Factors (10) and (11) were appropriately applied to the convictions for second degree murder and facilitation of attempted first degree murder. Enhancement factor (21), that the defendant committed an offense as a juvenile that would constitute a felony if committed by an adult, should have been applied to each of the convictions. The trial court acted within its discretion by determining that the mitigating factors, the defendant's youth and his lack of an adult criminal record, were entitled to little weight. That the defendant has been incarcerated in relation to these offenses since he was seventeen years of age likely explains the absence of an adult criminal record. Similarly, although the defendant was young when he committed these crimes, there was no proof that his youthfulness led to the commission of the crimes. Under these circumstances, it is our view that the trial court did not err by imposing the maximum sentence within the appropriate range for each of the defendant's convictions.

B. Consecutive Sentencing

The defendant next asserts that the trial court erred by imposing partially consecutive sentencing for his convictions for facilitation of attempted first degree murder, facilitation of aggravated burglary, and felony reckless endangerment, making the effective sentence 55 years with 25 years to be served at 100% and the remainder to be served at 30%. The state submits that consecutive sentencing is proper because the defendant qualifies as a dangerous offender. See Tenn. Code Ann. § 40-35-114(b)(4). Prior to the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case, our supreme court ruled that aggravating circumstances must be present before placement in any one of the classifications. Later, in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), our high court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. There were, however, additional words of caution:

> [C]onsecutive sentences should not routinely be imposed . . . and . . . the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.

Taylor, 739 S.W.2d at 230. The Sentencing Commission Comments adopted the cautionary language. Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments. The 1989 Act is, in essence, the codification of the holdings in Gray and Taylor; consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria[5] exist:

> (1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
> (2) The defendant is an offender whose record of criminal activity is extensive;
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
> (6) The defendant is sentenced for an offense committed while on probation; or
> (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b).

The length of the sentence, when consecutive in nature, must be "justly deserved in relation to the seriousness of the offense," Tenn. Code Ann. § 40-35-102(1), and "no greater than that deserved" under the circumstances, Tenn. Code Ann. § 40-35-103(2); State v. Lane, 3 S.W.3d 456 (Tenn. 1999).

The trial court ordered consecutive sentences on the following grounds:

[5] The first four criteria are found in Gray. A fifth category in Gray, based on a specific number of prior felony convictions, may enhance the sentence range but is no longer a listed criterion. See Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments.

He's not before this Court as a drug dealer, but he's admitted that he did sell, regularly, crack cocaine. And anyone involved in the criminal justice system must be painfully aware of the impact that has on human life.

Not just on the user, but the family of the user, the employer of the user, and everyone else that gets addicted to crack cocaine, and the victims of those addicts who commit crimes to support their addiction.

Again, that is not directly before this Court. What is before this Court is that this defendant, with at least two other codefendants that he knew of, went armed into a residential structure, and this defendant, personally - - first person - - shot and killed one person, and is criminally responsible for the near killing of two others.

That makes him a dangerous offender. And that grants this Court discretion to impose consecutive sentences, which the Court thinks that must, at least some extent in this case, do.

* * *

I don't thin[k] this defendant is subject to any mandatory consecutive sentencing.

And in exercising discretion, I don't thin[k] the Court wants to, on the one hand, give the defendant the maximum sentence and does not, on the other hand, want to mete out any leniency in this case.

I thin[k] what the Court wants to do is what the legislature and the appellate courts envision in our sentencing law. An that is that the Court take into consideration the conduct of this particular defendant, and try to fit the punishment to that conduct.

In Gray, our supreme court ruled that before consecutive sentencing could be imposed upon the dangerous offender, considered the most subjective of the classifications and the most difficult to apply, other conditions must be present: (a) that the crimes involved aggravating circumstances; (b) that consecutive sentences are a necessary means to protect the public from the defendant; and (c) that the term reasonably relates to the severity of the offenses. In State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995), our high court reaffirmed those principles, holding that consecutive sentences cannot be required of the dangerous offender "unless the terms reasonably relate[] to the severity of the offenses committed and are necessary in order to protect the public (society) from further criminal acts by those persons who resort to aggravated criminal conduct." The Wilkerson decision, which modified somewhat the strict factual guidelines for consecutive sentencing adopted in State v. Woods, 814 S.W.2d 378, 380 (Tenn. Crim. App. 1991), described sentencing as a "human process that neither can nor should be reduced to a set of fixed and mechanical rules." 905 S.W.2d at 938.

In determining that the defendant qualified for consecutive sentencing, the trial court failed to specifically find that an extended sentence reasonably related to the severity of the offenses and was necessary to protect the public against further criminal conduct by the defendant. Ordinarily, a remand or a modification of the sentence would be in order. The record, however, establishes that consecutive sentencing is appropriate. As the trial court did observe, the defendant and his co-defendants, all armed, forced their way into the Buie residence with the intent to rob the victims, creating a particularly dangerous situation. See Timothy Allen Moore, No. M2000-02933-CCA-

R3-CD (Tenn. Crim. App., at Nashville, Jan. 11, 2002) ("[Armed robbery] is a very serious crime, against which little protection is possible, and those who commit armed robberies upon innocent [victims] are, almost by definition, 'dangerous offenders.'"). Although the defendant claimed that he was unaware of the robbery plot, he nevertheless initiated gunfire in the apartment, where three children, one only six months old, were present. Everyone was at risk. Houston was murdered. Massey and Readus suffered life-altering injuries. In our view, the defendant's behavior demonstrated little or he had no regard for human life and no hesitation about committing a crime in which the risk to human life was high. The effective sentence reasonably relates to the seriousness of the offenses. In addition, the aggregate sentence of fifty-five years is necessary to protect the public from the defendant.

Accordingly, the judgments of the trial court are affirmed.

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GARY R. WADE, PRESIDING JUDGE